A

TAN AH TONG

v.

PARVEEN KAUR

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
WAN ADNAN MUHAMAD JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: W-02-146-2008]
14 APRIL 2009

C

CIVIL PROCEDURE: *Pleadings - Matters to be pleaded - Defendant's failure to specifically plead defence - Whether failure to plead fatal - Rules of the High Court 1980, O. 18 rr. 8 & 12*

D

CONTRACT: *Sale and purchase of land - Specific performance - Failure of seller to execute memorandum of transfer - Whether sale and purchase agreement null and void - Whether act of fraud pleaded - Whether evidence adduced to show restriction of land - Rules of the High Court 1980, O. 18 rr. 8 & 12*

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The High Court had granted specific performance of two sale and purchase agreements ('SPAs') in respect of two pieces of land ('the lands') between the buyer ('respondent') and the seller ('appellant') on evidence that the respondent had fully paid the purchase price for them. It was claimed, that the appellant had failed or neglected to take steps to obtain an individual title to the lands and to execute a registrable

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memorandum of transfer concerning them. However, the appellant contended that the two SPAs were null and void because they were prepared by his former solicitors (who had left the country and could not be traced) without his consent or authority. He claimed he had terminated the appointment of those solicitors prior to the date of the SPAs. The appellant also contended that the lands were subject to the

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condition that upon their subdivision and conversion, at least half of the lots must be allocated to bumiputras. This condition, he contended, frustrated the performance of the SPAs. In finding for the respondent, the High Court rejected the appellant's contention that the SPAs were done without his knowledge, consent or authority and that he had not

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specifically pleaded any act of fraud, mistake or misrepresentation against his former solicitors. Hence, the appellant appealed against the decision to the Court of Appeal.

Held (dismissing appeal with costs; affirming decision of High Court)

I

Per Ramly Ali JCA delivering the judgment of the court:

(1) The appellant could not rely on any of the defences of coercion, undue influence, fraud, misrepresentation or mistake to negate the element of his consent in the SPAs because he had failed to

specifically plead any of them in his statement of defence as required by O. 18 rr. 8 and 12 of the Rules of the High Court 1980. Failure to specifically plead any of those elements was fatal to the appellant's case. (para 19)

(2) The appellant did not adduce any evidence to show the restriction about the 50% allotment to bumiputras applied. There was no evidence to show any such restriction was endorsed on the title to the lands. In any event as the lands had been sub-divided into 81 lots out of which 25 had been registered in the names of non-bumiputras and the respondent's claim only involved two lots, the total of 27 lots was still less than the 50% limitation imposed by the land office (if any), thus making it possible for the two SPAs to be specifically enforced. (paras 27 & 28)

(3) The appellant's contention that he did not sign the two SPAs and that the signature therein was not his had caught the respondent by surprise as it was introduced only at the defence stage. The issue was not pleaded at all in his defence. The High Court was right to hold that the burden of proof was on the appellant and that he did not adduce any evidence of a handwriting expert to say that the signature in the SPAs were not his. (paras 23, 24 & 25)

Case(s) referred to:
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 14
Evidence Act 1950, s. 73A(2)(b)
Rules of the High Court 1980, O. 18 rr. 8, 12
Specific Relief Act 1950, s. 11(2)

For the appellant - Danny Yap; M/s Shyong Wee & Danny
For the respondent - Chandra Nair; M/s Thevin Chandran & Assocs

[Appeal from High Court, Kuala Lumpur; Suit No: S5-(F22)-425-1986]

Reported by Ashok Kumar

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by the defendant/appellant against the decision of the learned High Court Judge dated 17 January 2008, whereby after a full trial it was *inter alia* ordered that two sale and purchase agreements both dated 3 May 1974 in respect of two lands held under

A (a) HSM 1715 (4225) Lot No. PT 2261 Mukim Hulu Kelang Batu 7 1/4 Hulu Kelang Daerah Gombak and (b) HSM 1716 (4226) Lot No. PT 2262 Mukim Hulu Kelang Batu 7 1/4 Hulu Kelang Daerah Gombak were to be specifically performed subject to the fulfillment of certain conditions and costs were also ordered in favour of the respondent/
B plaintiff.

[2] The conditions imposed in the said judgment are as follows:

(a) The defendant shall, within a month hereof demand payment for the development costs to be charged and supported by the certificate
C from the defendant's accountant in accordance with P1A and P1B. The plaintiff shall make payment within a month of receipt of such demand from the defendant.

(b) The defendant shall, within a month hereof, demand payments of the conversion, the sub-division and survey fees from the plaintiff
D in proportion to the area of the plaintiff's sub-divided lots calculated on the amount claimed by the Land Office, Gombak, and such demands shall be supported by the certificates from the defendant's accountant as to the correctness of the sums demanded. The plaintiff shall make payments within a month of receipt of such demand by
E the defendant.

(c) Any other outgoing that the plaintiff is liable to pay under the two agreements shall be settled within two months from the date of the order; and

F (d) Provided that all the above have been settled within time, defendant shall transfer the respective lots to plaintiff within one month of full payment free from all encumbrances and the expenses of such transfer shall be borne by the plaintiff.

G **Plaintiff's Case**

[3] The plaintiff's case rests on the contention that by two Sale and Purchase Agreements (SPAs) dated 3 May 1974, the defendant (as vendor) agreed to sell to the plaintiff two pieces of land for a consideration of RM13,920 and RM14,400 respectively. The plaintiff has
H fully paid the purchase price of the said lands.

[4] The plaintiff claimed that in breach of the said SPAs, the defendant has failed and/or neglected to take the necessary steps to obtain an individual title to the said lands and to execute and register
I the memorandum of transfer of the lands to the plaintiff. To protect his interest the plaintiff continued to lodge caveat on the lands every six years.

[5] The said lands were later sold to a third party, ie, Asialand Housing Development Sdn Bhd for the purpose of developing the lands for a housing project.

Defendant's Contentions

[6] The defendant, on the other hand, contended *inter alia* that the two SPAs were made by the defendant's former solicitors, M/s Kirpal Singh Brar & Co (who had left the country and cannot be traced) without the knowledge and consent or authority of the defendant, as the defendant had on 20 April 1974 terminated with immediate effect the service of the said solicitors. Therefore the defendant claimed that the said SPAs are null and void and of no effect.

[7] The defendant further contended that there was a condition imposed by the Pengarah Tanah dan Galian, Selangor for the sub-division and conversion of the said lands, that at least 50% of the lots in respect of the said lands must be allocated to Bumiputra, thus rendering the said SPAs to be frustrated.

Findings Of The High Court Judge

[8] The learned High Court Judge allowed the plaintiff's claim with costs. Hence, this appeal before us now.

[9] In his judgment the learned High Court Judge had made the following findings:

(a) the plaintiff has adduced sufficient evidence to show that she has made full payment for the lands under the two SPAs;

(b) the evidence of the defendant that the two pieces of land were not sold to the plaintiff are rejected by the learned High Court Judge;

(c) the defendant has failed to plead all the facts of fraud or mistake specifically; and no allegation of misrepresentation against his former solicitors, M/s Kirpal Singh Brar in his amended statement of defence; and

(d) thus the learned High Court Judge rejected the defence that the purported sale of the said lands was done without his knowledge, consent or authority.

Findings Of This Court

[10] In the present case, the decision of learned High Court Judge was based on his findings of facts, after full trial of the suit before him. Therefore this court should be slow to interfere with the decision, based on such findings of facts unless there is clear justification for us to do so.

[11] The first issue raised by the appellant (defendant) in this appeal is that the learned High Court Judge was wrong in allowing specific performance relief of the two SPAs in favour of the plaintiff.

[12] It is not in dispute that the subject matter of the present case is the two SPAs in respect of landed property. Section 11 of the Specific Relief Act 1950 (Act 137) provides that the specific performance of any contract is a discretion of the court. It may be exercised when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

[13] Section 11(2) of the same Act provides:

> (2) Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

(see: *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476)

[14] In the present case, the plaintiff had specifically prayed for specific performance relief in their statement of claim (prayer a). Therefore the defendant's contention that the specific performance order was wrongly given by the High Court on the ground that the plaintiff had only prayed for damages, does not hold water, and must be rejected.

[15] This court agrees with the learned High Court Judge that in this case, damage is not an adequate remedy and therefore the specific performance order was rightly granted.

[16] The defendant's main defence is that the said SPAs were entered into by his former solicitors without his knowledge, consent and/or authority, as according to the defendant, he had on 20 April 1974, terminated with immediate effect the service of the said solicitors, and as such the said SPAs are null and void.

[17] On this issue the court shall refer to s. 14 of the Contracts Act 1950 which reads as follows:

> Consent is said to be free when it is not caused by:
>
> (a) coercion, as defined in section 15;
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> (b) undue influence, as defined in section 16;
>
> (c) fraud, as defined in section 17;
>
> (d) misrepresentation, as defined in section 18; or
>
> (e) mistake, subject to sections 21, 22 and 23.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

[18] In this respect the court agrees with the learned High Court Judge that in order to establish his defence on this point, the defendant must raise and prove any one of the five defences listed above.

[19] The existence of coercion, undue influence fraud, misrepresentation or mistake (or any of them) if proven, may negate the element of consent by the defendant (as he alleged), in entering into the SPAs. In order to prove any of the elements above, it must first be specifically pleaded by the defendant in his statement of defence as required under O. 18 r. 8 and r. 12 of the Rules of the High Court 1980. Failure to specifically plead any of those elements is fatal to the defendant's case. In the present case, the defendant has failed to specifically plead any of those elements, in his statement of defence. Therefore, the defendant cannot in law rely on any of those defences.

[20] The defendant relied on the documents marked as IDD41, IDD42 and IDD43 to support his allegation that the said SPAs were entered into without his knowledge, consent or authority and that he had terminated the service of Mr Kirpal Singh Brar as his solicitor with immediate effect in 1974.

[21] IDD41 is a photostat copy of a letter dated 20 April 1974, from the defendant to Mr Kirpal Singh Brar. IDD42 is a photostat copy of a letter dated 22 April 1974 from Mr. Kirpal Singh Brar to the defendant. IDD43 is a photostat copy of a letter dated 7 November 1975 from Mr. Kirpal Singh Brar to the defendant.

[22] The defendant admitted in his evidence that he had misplaced (thus cannot be traced) the original copies of all the documents IDD41, IDD42 and IDD43. The defendant has not adduced any evidence to show that all the three documents were true copies of the originals. The learned High Court Judge was correct in law when he held that those uncertified copies of the three documents do not qualify as certified true copies within the meaning of s. 73A(2)(b) of the Evidence Act 1950 and therefore not admissible in evidence. Therefore the defendant's defence on this issue cannot stand.

[23] The defendant also contended that the learned High Court Judge was wrong in dismissing his defence that the defendant did not sign the two SPAs and the signature there was not his.

[24] It is noted that the defendant introduced this line of defence (that the signatures in the two SPAs were not his), only at the defence stage and thus has certainly caught the plaintiff by surprise. The issue has not been pleaded at all in the statement of defence.

[25] Again, on this issue the court agrees with the findings of the learned High Court Judge when he said:

> So under section 103 of the Evidence Act 1950 it is incumbent on the Defendant to show that it was not his signatures on P1A and P1B and not the burden of the Plaintiff.
>
> The Defendant has not adduced any evidence by a handwriting expert that the signatures on P1A and P1B are not his.
>
> The Defendant has admitted in cross-examination that at least 45 sale and purchase agreements had been handled by Kirpal Singh Brar & Co. As such I reject the evidence of the Defendant that he did not sign P1A and P1B.

[26] The defendant has also raised the issue that a condition imposed by the Pengarah Tanah dan Galian Selangor for the said sub-division and conversion of the said lands is that at least 50% of the lots is to be allocated and transferred to Bumiputras, thus rendering the said SPAs to be frustrated and specific performance is not possible.

[27] The court finds no evidence adduced by the defendant to show the said restriction continued to apply. There is also no evidence to show any endorsement of such restriction on the title of the said lands.

[28] In this case the lands in question had been sub-divided into 81 lots. The defendant has not adduced evidence to show how many of the 81 lots have been registered in the names of non-bumiputras. In a consolidated suit, Her Ladyship Siti Norma Yaacob found that a total of 25 lots have been registered in the names of non-bumiputras. The plaintiff's claim in the present case involves only two lots. The addition of those two lots makes a total of 27 lots. So, the two lots (which are the subject matter of the present case) can still be registered in the name of the plaintiff as it is still less than 50% limitation imposed by the Land Office (if any), thus making it possible for the two SPAs to be specifically enforced, as ordered by the learned High Court Judge.

Conclusion

[29] After hearing all the parties, the court is satisfied that the appellant (defendant) has failed to convince the court that the learned High Court Judge had erred in coming to his decision dated 17 January 2008.

The learned High Court Judge had made correct findings of relevant facts and therefore has come to a correct decision. There is no justification whatsoever for this court to interfere with his decision.

[30] Therefore, on the above considerations, we, unanimously dismiss the appeal with costs. The order of the learned High Court Judge is affirmed. Deposit to the account of taxed costs.